SML Works Sdn Bhd v YO Leong & Co (sued as a firm)

HIGH COURT (KUCHING) — SUIT NO KCH-22NCvC-51/9 OF 2016
YEW JEN KIE J
28 DECEMBER 2017

Contract — Void contract — Lack of consideration — Whether there was consideration flowing from plaintiff to Ching Chong — Whether defendant breached contractual duty to plaintiff in failing to incorporate term into contract — Whether CCS agreement void — Contracts Act 1950 s 26

Tort — Negligence — Professional negligence — Plaintiff sued defendant for professional negligence — Whether defendant negligent in preparing agreements

The plaintiff sued the defendant, an advocate and solicitor, for negligently preparing a 'construction cum sale agreement' ('the CCS agreement') executed between the plaintiff and Chin Chong Development Sdn Bhd ('Chin Chong'). The plaintiff was engaged by Chin Chong to complete construction on partially constructed works of double story semi-detached houses. The defendant was jointly retained by the plaintiff and Chin Chong to act on their behalf to prepare an agreement and related instruments. The plaintiff and Chin Chong had agreed that in consideration of the plaintiff agreeing to provide labour and material to carry out, perform and complete the partial works and pay Chin Chong a sum of RM900,000, Chin Chong was to assign absolutely all its beneficial interest over seven units of houses to the plaintiff. The plaintiff alleged that the defendant was in breach of the implied term of its contractual duty to the plaintiff to take care or was negligent in preparing the CCS agreement as the defendant had failed to include the fundamental term of the plaintiff being entitled to Chin Chong's seven units of houses. The plaintiff had also claimed that the agreement was void under s 26 of the Contracts Act 1950.

Held, dismissing the plaintiff's claim with costs of RM25,000:

(1) There was consideration flowing from Chin Chong to the plaintiff in the CCS agreement. The CCS agreement, power of attorney and deed of substitution of power of attorney formed a series of agreements and they were meant to be read together. The defendant had amply showed that the plaintiff and Chin Chong had intended that the power of attorney and the deed of substitution of power of attorney to be meant for the sale and/or assignment of Chin Chong's units to the plaintiff in consideration of the plaintiff agreeing to carry out and complete the works (see paras 39 & 48–49).

(2) The defendants had exercised all due care, skill and diligence in the preparation of the CCS Agreement, power of attorney and deed of substitution of power of attorney. As solicitors, the defendant did not breach their duty to the plaintiff to take care in preparing the agreement for the plaintiff (see paras 52 & 56).

(3) The plaintiff had breached the terms and conditions of the CCS agreement when they had neglected, refused and/or failed to pay the remaining balance of RM625,000 to Chin Chong within the stipulated period. The plaintiff had also failed, neglected and/or refused to complete the said partial works within the stipulated time as contained in the CCS agreement (see para 61).

(4) The plaintiff was estopped and precluded from saying that the CCS agreement was void in law and lacked consideration. This was due to the fact that the plaintiff had permitted and induced the defendant to believe that the CCS agreement, the power of attorney and the deed of substitution of power of attorney were satisfactory to the plaintiff (see para 66).

(5) The plaintiff's claim was statute barred as it was not brought within the time frame stipulated by Item 19 of the schedule of the Sarawak Limitation Ordinance. The action against the defendant was an action in the tort of professional negligence, therefore Item 19 was applicable (see paras 78 & 81).

[Bahasa Malaysia summary

Plaintif menyaman defendan, peguambela dan peguamcara, kerana dengan cuai menyediakan 'construction cum sale agreement' ('perjanjian CCS') dilaksanakan di antara plaintif dan Chin Ching Development Sdn Bhd ('Chin Chong'). Plaintif diupah oleh Chin Chong untuk menyiapkan pembinaan sebahagian kerja-kerja pembinaan rumah-rumah berkembar dua tingkat. Defendan adalah retainer bagi pihak plaintif dan Chin Chong untuk bertindak bagi pihak mereka untuk menyediakan perjanjian dan instrumen yang berkaitan. Plaintif dan Chin Chong telah bersetuju bahawa dalam balasan plaintif bersetuju untuk memberikan perkhidmatan dan bahan-bahan untuk menjalankan, melaksanakan dan menyiapkan kerja-kerja sebahagian tersebut dan membayar Chin Chong wang sejumlah RM900,000, Chin Chong hendaklah menyerahkan secara mutlak kesemua kepentingan benefisialnya ke atas tujuh unit rumah kepada plaintif. Plaintif mendakwa bahawa defendan melanggar terma tersirat tugas kontraktualnya kepada plaintif untuk berhati-hati atau cuai dalam menyediakan perjanjian CCS tersebut memandangkan defendan telah gagal untuk memasukkan terma asas plaintif sebagai berhak kepada tujuh unit rumah Chin Chong. Plaintif juga menuntut bahawa perjanjian adalah tak sah di bawah s 26 Akta Kontrak 1950.

Diputuskan, menolak tuntutan plaintif dengan kos sebanyak RM25,000:

(1) Terdapat balasan mengalir daripada Chin Chong kepada plaintif dalam perjanjian CCS. Perjanjian CCS, surat kuasa wakil dan surat ikatan penggantian surat kuasa wakil membentuk siri perjanjian-perjanjian dan ia bermaksud untuk dibaca bersama. Defendan telah dengan mencukupi menunjukkan bahawa plaintif dan Chin Chong telah berniat bahawa surat kuasa wakil dan surat ikatan penggantian surat kuasa wakil adalah untuk jualan dan/atau penyerahan hak unit-unit Chin Chong kepada plaintif dalam balasan plaintif bersetuju untuk menjalankan dan menyiapkan kerja-kerja tersebut (lihat perenggan 39 & 48–49).

(2) Defendan-defendan telah menjalankan kesemua kewajipan berhati-hati, kemahiran dan usaha dalam menyediakan perjanjian CCS, surat kuasa wakil dan surat ikatan penggantian surat kuasa wakil. Sebagai peguam, defendan tidak melanggar kewajipan mereka kepada plaintif untuk berhati-hati dalam menyediakan perjanjian tersebut untuk plaintif (lihat perenggan 52 & 56).

(3) Plaintif telah melanggar terma dan syarat perjanjian CCS apabila mereka cuai, enggan dan/atau gagal untuk membayar baki jumlah sebanyak RM625,000 kepada Chin Chong dalam masa tempoh yang ditetapkan. Plaintif juga gagal, cuai dan/atau enggan menyiapkan kerja-kerja sebahagian tersebut dalam masa yang ditetapkan seperti yang terdapat di dalam perjanjian CCS (lihat perenggan 61).

(4) Plaintif diestop dan dikecualikan daripada menyatakan bahawa perjanjian CCS aadalah tak sah dari segi undang-undang dan tidak mempunyai balasan. Ini adalah akibat daripada fakta bahawa plaintif telah membenarkan dan membuat defendan percaya bahawa perjanjian CCS, surat kuasa wakil dan surat ikatan penggantian surat kuasa wakil adalah memuaskan kepada plaintif (lihat perenggan 66).

(5) Tuntutan plaintif adalah dihalang masa kerana ia tidak difailkan dalam rangka masa yang ditetapkan oleh Perkara 19 Jadual Ordinan Had Masa Sarawak. Tindakan terhadap defendan adalah tindakan dalam kecuaian profesional, oleh itu Perkara 19 adalah terpakai (lihat perenggan 78 & 81).]

Notes

For cases on lack of consideration, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7487–7489.

For cases on professional negligence, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1716–1816.

Cases referred to

Avaran Kutti (Minor) v Cheriyakkan And Ors AIR 1953 Mad 480, HC (refd)
Vun Chun Fah & Anor v Telekom Malaysia Bhd [1997] MLJU 239, HC (refd)

Legislation referred to

Contracts Act 1950 ss 26, 164, 166, 171
Evidence Act 1950 ss 91, 92
Limitation Ordinance (Cap 49) Schedule, Parts II, III, Items 19, 93
Rules of Court 2012 O 35 r 4(6)

Richard Poh (Poh & Co Advocates) for the plaintiff.
Sunny Si (Si & Assoc Advocates) for the defendant.

Yew Jen Kie J:

INTRODUCTION

[1] The plaintiff herein sued the defendant, an advocate and solicitor, for negligence in the preparation of the agreement termed as 'construction cum sale agreement' ('the CCS agreement') executed between the plaintiff and one Chin Chong Development Sdn Bhd ('Chin Chong') on 11 January 2012 and for damages.

AGREED BACKGROUND FACTS

[2] The agreed background facts, as shown in the statement of agreed fact ('SAF'), can be summarised as follows:

(a) Chin Chong and the landowners of the parcel of land described as Lot 243, Block 83 Kuching Central Land District ('the said land') entered into a development agreement dated 20 February, 2004 whereby the landowner engaged Chin Chong to develop the said land by sub-dividing it into 14 sub-lots and to construct thereon 14 units of double storey semi-detached houses ('the said houses');

(b) in consideration of the said landowner contributing the said land for the development and in consideration of Chin Chong agreeing to sub-divide the said land and to construct and complete the said houses, the landowner is to be beneficially entitled to sub-lots 10–14 of the said houses ('the landowners' units') while Chin Chong is to be beneficially entitled to keep for himself sub-lots 1–8 of the said houses ('Chin Chong's units');

(c) pursuant to the development agreement, Chin Chong had completed the landowners' units and had handed over the same with vacant possession to the landowners;

(d) at the material time, a portion of Chin Chong's units was not yet completed;

(e) Chin Chong was desirous of engaging the plaintiff to construct the partially completed works and the plaintiff was desirous to be engaged to complete the said partially completed works;

(f) on or about January 2012, the plaintiff and Chin Chong jointly retained the defendant as solicitors to act on their behalf to prepare an agreement and related instruments;

(g) the terms of the agreement as agreed between the plaintiff and the Chin Chong and as conveyed to the defendant by the plaintiff and Chin Chong were, inter alia, as follows:

(i) Chin Chong shall engage the plaintiff to carry out and complete the partially completed Chin Chong's units in accordance with the relevant approved plans (at the plaintiff's own costs);

(ii) the plaintiff shall pay Chin Chong the sum of RM900,000 in accordance with the stipulated time as contained in the CCS agreement; and

(iii) Chin Chong shall assign to the plaintiff absolutely all its beneficial interest in Chin Chong's units;

(h) the plaintiff and Chin Chong further agreed that in consideration of the plaintiff agreeing to provide labour and material to carry out, perform and complete the said partial works and further that the plaintiff shall pay to Chin Chong a sum of RM900,000, Chin Chong shall assign to the plaintiff absolutely its beneficial interest in Chin Chong's units;

(i) pursuant to the CCS agreement, the plaintiff did make various payments to Chin Chong amounting to RM270,000; and

(j) the defendant did charge the plaintiff legal fees and disbursement in the sum of RM3,470 for the said service which were paid by the plaintiff to the defendant on 6 March 2012.

THE PLAINTIFF'S CASE

[3] The plaintiff's case as per the plaintiff's case summary (encl 43) are follows:

(a) the plaintiff and a company known as Chin Chong Development Sdn Bhd ie Chin Chong agreed that the plaintiff take over partially completed works in a development project wherein Chin Chong was beneficially entitled to seven units of houses ie Chin Chong's units;

(b) the plaintiff and Chin Chong further agreed that in consideration of the plaintiff agreeing to provide labour and material to carry out, perform and complete the said partially completed works and further that the plaintiff shall pay to Chin Chong a sum of RM900,000, Chin Chong shall assign to the plaintiff absolutely its beneficial interest in Chin Chong's units;

(c) the plaintiff and Chin Chong then jointly engaged and appointed the defendant to prepare an agreement reflecting their oral agreement;

(d) the defendant, as professional, in preparing an agreement, which the defendant called a construction cum sale agreement ie CCS agreement, was in breach of the implied term of its contractual duty to the plaintiff to take care or was negligent in doing so by:

(i) failing to include the fundamental term whereby the plaintiff was to be entitled to have Chin Chong assign to the plaintiff its beneficial rights in Chin Chong's units;

(ii) failing to set out the exact scope of the said partial works;

(iii) failing to ensure that the plaintiff receive consideration under the CCS agreement; and

(iv) causing the plaintiff and Chin Chong to execute an agreement which was void under s 26 of the Contracts Act 1950; and

(e) the plaintiff thereby suffered loss and damage.

THE DEFENDANT'S DEFENCE

[4] The defendant's defence as per the defendant's case summary (encl 37) are as follows:

(a) the defendant had exercised all due care, skill and diligence in the preparation of the CCS agreement, power of attorney and deed of substitution of power of attorney as agreed and conveyed by the plaintiff and Chin Chong;

(b) the plaintiff had breached the terms and conditions of the CCS agreement by failing to pay the remaining balance of RM625,000 to Chin Chong and by failing to complete the said partial works within the stipulated time as contained in the CCS agreement;

(c) the plaintiff, by conduct, is estopped and precluded from saying that the CCS agreement is, inter alia, void in law and or lack consideration;

A (d) the plaintiff's allegation that the CCS agreement is void in law for lack of consideration is an afterthought in order to avoid its obligations and/or in order to negate the plaintiff's breaches of the terms and condition of the CCS agreement;

B (e) the plaintiff had failed to take any or any reasonable steps to mitigate the loss or damage allegedly suffered by them;

(f) there is duplicity in the plaintiff's claim of RM275,000 against the defendant. The plaintiff in Suit No KCH-A52NCvC-14/4 of 2016 (SC 2) is claiming the sum of RM275,000 against Chin Chong; and

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(g) the plaintiff's claim is statute barred as it was not brought within the time limited by Item 19 (two years) and/or Item 93 (two years) of Part II and Part III of the Schedule to the Limitation Ordinance (Sarawak Cap 49).

D ISSUES FOR DETERMINATION

[5] The parties could not agree on common issues to be tried, thus each party had prepared their respective proposed issues.

E *The plaintiff's issues*

[6] The plaintiff's proposed issues to be tried (encl 41) are as follows:

(1) whether there was any consideration flowing from Chin Chong to the plaintiff in the CCS agreement dated 11 January 2012 prepared by the defendant;

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(2) if the answer to the above is in the negative, whether the power of attorney ('PA') and deed of substitution of power of attorney prepared by the defendant both dated 15 April 2012 could, in law, convey beneficial interest in Chin Chong's units to the plaintiff?

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(3) if the answer to the above is in the affirmative, whether the said PA and deed of substitution of power of attorney can replace the statutory requirement to have consideration in an agreement for it to be valid as stipulated under s 26 of the Contracts Act 1950?

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(4) whether the defendant, as solicitors engaged to prepare an agreement and paid professional fees, owe a duty to the plaintiff to take care in preparing the said agreement and if so whether the defendant was in breach of that duty in the said preparation?

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(5) whether the CCS agreement is void ab initio for want of consideration pursuant to s 26 of the Contracts Act 1950?

(6) whether the plaintiff's claim herein is statute barred by the Limitation Ordinance (Cap 49)?

The defendant's issues

[7] The defendant's proposed issues to be tried (encl 36) are as follows:

(1) whether the defendant had exercised all due care, skill and diligence in the preparation of the CCS agreement, power of attorney and deed of substitution of power of attorney as agreed and conveyed by the plaintiff and Chin Chong?

(2) what were the intentions of the plaintiff and Chin Chong in January 2012?

2.1 Whether the terms of the agreement as agreed and conveyed by the plaintiff and Chin Chong are, inter alia, as follows:

(a) Chin Chong shall engage the plaintiff to carry out and complete the partially completed Chin Chong's units in accordance with the relevant approved plans (at the plaintiff's own costs);

(b) the plaintiff shall pay Chin Chong the sum of RM900,000 in accordance with the stipulated time as contained in the CCS agreement; and

(c) Chin Chong shall assign to the plaintiff absolutely all its beneficial interest in Chin Chong's units.

2.2 whether the plaintiff and Chin Chong intended the CCS agreement, power of attorney and deed of substitution of power of attorney to be meant for the sale and/or assignment of Chin Chong's units to the plaintiff in consideration of the plaintiff agreeing to provide labour and material to carry out, perform and complete the said partial works and a further payment of RM900,000 to Chin Chong?

2.3 whether the plaintiff undertook to provide labour and material to carry out, perform and complete the Said Partial Works in accordance with the relevant plans on a 'as is where is basis'?

(3) whether the plaintiff exercised the power given under the deed of substitution of power of attorney by instructing the defendant to draft various sale and purchase agreements and supplementary deeds in respect of the Chin Chong's units?

(4) whether the plaintiff breached the terms and condition of the CCS agreement as follows:

4.1 failing to pay the remaining balance of RM625,000 to Chin Chong within the agreed stipulated time as contained in the CCS agreement; and/or

4.2 failing to complete the said partial works within the

stipulated time as contained in the CCS agreement.

(5) whether the plaintiff, by conduct, is estopped and precluded from saying that the CCS agreement is, inter alia, void in law and or lack consideration?

(6) whether the plaintiff's allegation that the CCS agreement is void in law for lack of consideration is an afterthought in order to avoid its obligations and/or in order to negate the plaintiff's breaches of the terms and condition of the CCS agreement?

(7) whether the plaintiff had taken any or any reasonable steps to mitigate the loss or damage allegedly suffered by them?

(8) whether there is duplicity in the plaintiff's claim of RM275,000 against Chin Chong given that the plaintiff, in Suit No KCH-A52NCvC-14/4 of 2016 (SC 2), is claiming the sum of RM275,000 against Chin Chong?

(9) whether the plaintiff's claim is statute barred as it was not brought within the time frame stipulated by Item 19 (two years) and/or Item 93 (three years) of Part II and Part III of the Schedule of the Limitation Ordinance (Sarawak Cap 49)?

BUNDLE OF DOCUMENTS

[8] For the purpose of the trial, the following bundles of documents were filed:

(i) agreed bundle of documents (encl 47) which is marked exh A, as the parties have agreed that encl 47 are Part A documents since there is no dispute as to authenticity as well as contents of the documents contained therein. Reference to the document in encl 47 is by page number followed by exh A, eg p 1 exh A; and

(ii) save for Items 1, 2, 3(a), 4, 5, 14, 15, 16, 17, 18 and 23 of the defendant's bundle of documents (encl 30) which are Part A documents, the rest of the items in encl 30 are marked Part C as they are disputed documents. The Part C documents, when admitted as exhs, were marked according to the page number followed by the words 'Part C' eg exh 1 Part C.

ORDER OF SPEECH

[9] At the outset of the trial on 9 August, 2017, learned counsel for the plaintiff applied to court under O 35 r 4(6) of the Rules of Court 2012 for a directive that the defendant should begin the case as the burden of proof lies on the defendant. It was submitted that based on the plaintiff's case summary and issues to be tried, primarily the issue is whether there is any consideration

flowing from Chin Chong to the plaintiff. There is no factual issue that the plaintiff need to prove and they are not in dispute and all the plaintiff's issues are questions of law which can be dealt with in submission. It is for the defendant to discharge the burden of the defence raised. In fact, the plaintiff could elect not to adduce any evidence.

[10] Learned counsel for the defendant opposed the plaintiff's above application and submitted that the cause of action lies in tort of negligence and does not involve interpretation of contractual document which are not in dispute. As the plaintiff is alleging professional negligence against the defendant, it bears the burden of proof and must begin.

[11] The plaintiff is plainly relying on the CCS agreement to show that there is no provision therein to show that Chin Chong would assign the beneficial interest Chin Chong's units to the plaintiff in consideration for the plaintiff agreeing to take over the partial incomplete project from Chin Chong which renders the CCS agreement void under s 26 of the Contracts Act 1950, and that under the law, the power of attorney cannot confer beneficial interest. Thus, the defendant is acting negligently in the preparation of the CCS agreement. On the stance taken by the plaintiff, the court allowed the application and ordered the defendant to begin the case.

TESTIMONY OF DW1

[12] DW1, Alexander Yeo Chuan Kiat, was a partner of the defendant's firm at the material time and the advocate who handled the matter between the plaintiff and Chin Chong.

[13] In his witness statement marked WSDW1 (encl 49), which the parties had agreed to be taken as read, DW1 testified that sometime in January 2012, the plaintiff and Chin Chong jointly retained the defendant's firm as advocates to act on their behalf to prepare an agreement and related instruments. He accordingly prepared the CCS agreement (pp 1–2 exh A), the power of attorney (pp 13–17 exh A) and the deed of substitution of power of attorney (pp 18–20 exh A).

[14] To question 4 in WSDW1 as to what are the terms of the agreement as agreed and conveyed by the plaintiff and Chin Chong, DW1 answered:

> A. The terms of the agreement as agreed and conveyed by the plaintiff and Chin Chong were, inter alia, as follows:
>
> (1) Chin Chong shall engage the plaintiff to carry out and complete partially completed Chin Chong's units in accordance with the relevant approved plans (at the plaintiff's own costs).

(2) The plaintiff shall pay the defendant the sum of RM900,000.00 in accordance with the stipulated time as contained in the CCS agreement.

(3) Chin Chong shall assign to the plaintiff absolutely all its beneficial interest in Chin Chong's units.

The plaintiff and Chin Chong intended the CCS agreement, Power of Attorney and Deed of Substitution of Power of Attorney to be meant for the sale and/or assignment of Chin Chong's units to the plaintiff in consideration of the plaintiff agreeing to provide labour and material to carry out perform and complete the Said Partial Works and a further payment of RM900,000.00 from the plaintiff to Chin Chong.

The plaintiff undertook to provide labour and material to carry out perform and complete the Said Partial Works in accordance with the relevant approved plans on a 'as is where is basis'.

[15] To question 5 in WSDW1 as to what are the 'series of agreement/instrument' he prepared under the retainer, DW1 answered:

The Power of Attorney and Deed of Substitution of Power of Attorney were prepared to reflect the terms enumerated in 4.A above pursuant to Clause 3 of the CCS agreement which reads:

3. POWER OF ATTORNEY

At the request of the Contractor, the Developer shall assist the Contractor, at their cost and expenses, to obtain the Power of Attorney from the landowner in respect of the Developer's unit.

[16] Pursuant to cl 3 of the CCS agreement, Chin Chong did obtain the power of attorney (pp 13–17 exh A) from the landowners. Thereafter Chin Chong and the plaintiff executed the deed of substitution of power of attorney (pp 18–20 exh A).

[17] DW1, in his cross-examination, said that the consideration flowing from Chin Chong to the plaintiff is reflected in cl 3 of the CCS a greement (see Q&A 35 p 19 notes of proceedings). DW1 maintained that the CCS agreement must be read together with the power of attorney and the deed of substitution of power of attorney (see Q&A 40).

[18] Pertaining to the question in cross-examination why he did not incorporate the term that 'Chin Chong shall assign to the plaintiff absolutely all its beneficial interest in Chin Chong's units', DW1 at first said that he could not remember but later he agreed that he had forgotten to put it in the CCS agreement (see Q&A 34 and 44 p 21 notes of proceedings).

[19] DW1 agreed at Q&A 38 in cross-examination that at the material time,

there was no request for and no power of attorney had been prepared and signed.

[20] In Q 52, during cross-examination, reference was made to the following clause in the draft supplementary deed to the construction cum sale agreement:

> 2. Upon payment in full of the purchase price in accordance with Clause 1 hereof:
>
> 2.1 the Developer shall have no rights and interests whichever legal equitable or otherwise in the Developer's units and/or the Principal Agreement and declare that they shall have no claims against the Contractor or any other person or persons in respect of the Developer's units and/or the Principal Agreement.
>
> 2.2 The Contractor shall become absolute owner of the Developer's units and be at liberty to sell, assign or otherwise dispose of the Developer's units to any person, firm or corporation.
>
> 2.3 The Contractor may at its absolute discretion require the Developer to execute a Deed of Assignment assigning absolutely all the Developer's right title share and interest in the Developer's units to the Contractor.

DW1 disagreed when it was put to him that this was the clause meant to put into effect the instruction of the plaintiff and Chin Chong which DW1 had omitted in the CCS agreement.

CONTENTION OF THE PLAINTIFF

[21] Learned counsel for the plaintiff submitted that the defendant owes a duty of care to the plaintiff under the contract to exercise all due care, skill and diligence in the preparation of the CCS agreement.

[22] Learned counsel for the plaintiff submitted that on the issue whether there is consideration in the CCS agreement, it can be determined by examining the document itself.

[23] It was submitted that it was a term of the agreement as agreed and conveyed by the plaintiff and Chin Chong to DW1 that Chin Chong shall assign to the plaintiff absolutely all its beneficial interest in Chin Chong's units. It is clear from the CCS agreement that this consideration was not incorporated as an agreed term in the CCS agreement and this omission has caused the CCS agreement to be a void agreement with no legal effect in the first place.

[24] It was submitted that DW1 had admitted that, after initially answering

A that he could not remember whether he had omitted to incorporate this consideration in the CCS agreement, he forgot to incorporate this material term in the CCS agreement (see Q&A 43 and 44 notes of proceedings).

B **[25]** Learned counsel for the plaintiff submitted that DW1 subsequently prepared a supplementary deed to remedy this earlier mistake of omission. At para 2 of the said supplementary deed were the following terms:

2. Upon payment in full of the purchase price in accordance with Clause 1 hereof:

C 2.1 the Developer shall have no rights and interests whichever legal equitable or otherwise in the Developer's units and/or the Principal Agreement and declare that they shall have no claims against the Contractor or any other person or persons in respect of the Developer's units and/or the Principal Agreement.

D 2.2 The Contractor shall become absolute owner of the Developer's units and be at liberty to sell, assign or otherwise dispose of the Developer's units to any person, firm or corporation.

2.3 The Contractor may at its absolute discretion require the Developer to execute a Deed of Assignment assigning absolutely all the E Developer's right title share and interest in the Developer's units to the Contractor.

[26] It was submitted that the above terms were the terms that the defendant had forgotten and should have included in the CCS agreement in the first F place.

[27] It was submitted that, by DW1's own admission that the plaintiff and Chin Chong did not tell him how to prepare the document, the defendant, therefore, has not established that the plaintiff and Chin Chong had G specifically instructed the defendant what to prepare. Thus, it was not an established fact that the plaintiff and Chin Chong had agreed, much less conveyed to the defendant on any power of attorney and deed of substitution of power of attorney.

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[28] It was further submitted that whatever intention the plaintiff and Chin Chong had for the CCS agreement, the power of attorney and the deed of substitution of power of attorney is of no relevance. What is relevant is the interpretation of the CCS agreement executed by the plaintiff and Chin I Chong.

[29] *A Dictionary of Law* (6th Ed) by Oxford University Press defines void contract as:

A contract that has no legal force from the moment of its making (compare voidable contract)

[30] It was submitted that since the CCS agreement is a void agreement which is not legally enforceable from the moment of its making, it is immaterial what act had been done or failed to be done by the plaintiff on the mistaken belief that it is a valid and lawful agreement, as there is nothing to be performed under a void contract. As such, neither will any of the act performed make a void/unenforceable agreement valid, nor can the plaintiff be said to be in breach of the CCS agreement which had no legal effect in the first place.

[31] It was contended that the power of attorney cannot confer any beneficial interest as the relationship created by a power of attorney between the donor and donee is that of principal and agent. Reference was made to the following legal writings to support the argument:

(a) *Power of Attorney by Trevor M Aldrige* (10th Ed), para 1–01 wherein a power of attorney is defined as 'a document by which one person ('donor') gives another person ('attorney') the power to act on his behalf and in his name';

(b) *Halsbury Law of Malaysia* (Vol 11(2), 2011 Ed) para (320.033) states, 'The law application where a Power of Attorney is created between a donor and a donee is that of principal and agent';

(c) *Halsbury's Law of England* (Vol 1, (4th Ed)), states: 'All moneys received on the principal's behalf must paid over or accounted for to the principal upon request'; and

(d) reference was also made to ss 164, 166 and 171 of the Contracts Act 1950 which spelt out the duties and obligations of an agent.

[32] Learned counsel for the plaintiff further contended that the power of attorney and the deed of substitution of power of attorney were not in in existence at the execution of the CCS agreement, so they could not be read together with the CCS agreement as asserted by DW1.

[33] Learned counsel for the plaintiff also submitted that the defence that since it was the intention of the plaintiff and Chin Chong for Chin Chong to convey Chin Chong's units to the plaintiff, there was, therefore, no necessity to express that intention in the CCS agreement, goes against the purpose of preparing a written agreement.

[34] It was submitted that cl 27 'ENTIRE AGREEMENT' of the CCS agreement would prevent the plaintiff from relying on any oral agreement

between the plaintiff and Chin Chong if the plaintiff were to sue Chin Chong based on the CCS agreement.

[35] Further, pursuant to ss 91 and 92 of the Evidence Act 1950, the plaintiff would be prevented from adducing parol evidence to enforce its rights.

THE COURT'S DETERMINATION

The plaintiff's proposed issue No 1

> Whether there was any consideration flowing from Chin Chong Development Sdn Bhd ('Chin Chong') to the plaintiff in the CCS agreement') dated 11 January 2012 prepared by the defendant?

[36] In gist, from the pleadings, the line of questions posed to DW1 in the cross-examination and the submission of the plaintiff, the main crux of plaintiff's case is that the CCS agreement did not contain an agreed term of the plaintiff and Chin Chong that upon the plaintiff having constructed and completed the said partially completed works and upon payment in full the sum of RM900,000, Chin Chong shall assign Chin Chong's units absolutely to the plaintiff.

[37] The defence is that the plaintiff and Chin Chong intended the CCS agreement, power of attorney and deed of substitution of power of attorney to be meant for the sale and/or assignment of Chin Chong's unit to the plaintiff in consideration of the plaintiff agreeing to carry out and complete the said partial work. Clause 3 of the CCS agreement reflected the consideration flowing from Chin Chong to the plaintiff.

[38] At the risk of repetition, cl 3 of the CCS agreement is reproduced as below:

> 3. POWER OF ATTORNEY
>
> At the request of the Contractor, the Developer shall assist the Contractor, at their cost and expense, to obtain the Power of Attorney from the landowner in respect of the Developer's unit.

[39] It is a fact that the power of attorney and the deed of substitution of power of attorney were not in existence at the time the CCS agreement were prepared and signed. However, as learned counsel for the defendant had rightly submitted, the words 'shall assist' and 'to obtain' in cl 3 of the CCS agreement clearly showed that the CCS agreement is in contemplation of the power of attorney and deed of substitution of power of attorney which will have to be drawn up subsequently. Although the CCS agreement was executed at a

different time from the power of attorney and the deed of substitution of power of attorney, it is clear that they form a series of agreement/instrument and are to be read together.

[40] The defendant has adduced unchallenged evidence that Chin Chong had subsequently obtained the power of attorney dated 15 March 2012 (pp 13–17 exh A) from the landowners and simultaneously, the deed of substitution of power of attorney (pp 18–19 exh A) were executed by the plaintiff and Chin Chong on 15 March 2012, two months and four days after signing the CCS agreement.

[41] Pursuant to the power of attorney dated 15 March 2012 executed by the landowner (pp 13–17 exh A), Chin Chong was, inter alia, given the power:

(a) cl 1: 'To develop/compete the construction of the Developer's units on our land or any part thereof in accordance with the terms of the said principal Agreement for any period and for such consideration and with and subject to such covenants condition and restrictions or otherwise as my attorney may think fit';

(b) cl 8: 'To enter into such agreements or assignment and carry into effect and perform the same as our Attorney may think fit in respect of the Developer's units on the said land';

(c) cl 10: 'To execute, sign and enter into Sale and Purchase Agreement, Memorandum of Transfer and other documents necessary for the sale/transfer or deal with all the Developer's units together with the building to be built in the said land thereon to any purchaser(s) or third party/ies'; and

(d) cl 12: 'To receive and take the purchase money or proceed thereof payable in respect of such sale or any other income due or accruing to the Developer's units or sublots or any part thereof from the sale of the sublots and to give effectual receipts for the same'.

[42] It is significant to note that the power of attorney was made pursuant to the development agreement and subject to the terms and conditions contained therein. Clause 5.4 of the development agreement stipulated that 'subject to the construction and completion of the landowner's units, the landowner hereby agree that the developer's unit shall be the property of the developer absolutely and the developer shall have full and absolute right and discretion to develop the developer's units as and when and in such manner as it thinks fit without any hindrance and/or interference from the landowner'.

[43] It is an agreed fact that Chin Chong had completed and delivered the landowners' units with vacant possession. Thus, pursuant to cl 5.4 of the

development agreement, Chin Chong's units shall become the absolute property of Chin Chong and Chin Chong has the discretion to develop them as it thinks fit without any hindrance and/or interference from the landowners. By virtue of cll 1, 8, 10 and 12 of the PA, Chin Chong has been empowered to deal with Chin Chong's units including completing them, selling them and receiving the purchase money and proceeds thereof from the sale.

[44] Clause 1 of the deed of substitution of power of attorney dated 15 March 2012 (pp 18–19 exh A) clearly states:

> In exercise of the power expressly conferred to us, we appoint the contractor to be our substitute and to be the attorney of the Donor with authority to do all things authorized in the Instrument on behalf of the Donor as if Contractor had been appointed by the Donor as their Attorney.

[45] Clause 1 of the deed of substitution of power of attorney showed that Chin Chong, having been empowered by the donor/landowner, had appointed the plaintiff to substitute Chin Chong to be the attorney of the donor/landowner with authority 'to do all the thing authorised in the instrument on behalf of the donor' as if the plaintiff had been appointed by the donor as their attorney.

[46] As regard the plaintiff's submission that the PA cannot confer any beneficial interest and if the plaintiff had sold Chin Chong's units relying on the PA and the deed of substitution of power of attorney, Chin Chong is entitled to call upon the plaintiff to account to Chin Chong every cent or benefit it had received thereunder, suffice it to say that by virtue of the deed of substitution of power of attorney, the plaintiff is not the attorney to Chin Chong but an attorney to the landowners. As such, Chin Chong has no locus to demand for an account from the plaintiff.

[47] It is highly improbable that the donor/landowner would demand an account from the plaintiff, who is the attorney, by virtue of the deed of substitution of power of attorney, because by virtue of cl 5.4 of the development agreement and that vacant possession of the landowners' units had been delivered to them, Chin Chong's units have become the property of Chin Chong absolutely. Besides, pursuant to cll 1, 8, 10 and 12 of the PA, the plaintiff (after the execution of the deed of substitution of power of attorney) has now been empowered to deal with Chin Chong's units including completing, selling and receiving the purchase money and proceeds thereof from the sale.

[48] Against the factual matrix of the case and reading cl 3 of the CCS agreement together with the PA and the deed of substitution of power of attorney, the defendant has amply showed that the plaintiff and Chin Chong

had intended that the PA and the deed of substitution of power of attorney to be meant for the sale and/or assignment of Chin Chong's units to the plaintiff in consideration of the plaintiff agreeing to carry out and complete the said partial works.

[49] For the reasons aforesaid, I find that there is consideration and it is reflected in cl 3 of the CCS agreement. Thus, my answer to issue No 1 of the plaintiff's issue for determination is in the affirmative.

The plaintiff's proposed issue No 2

If the answer to the above is in the negative, whether the PA and the deed of substitution of power of attorney prepared by the defendant both dated 15 April 2012 could, in law, convey beneficial interest in Chin Chong's units to the plaintiff?

[50] By reason of my affirmative answer to the plaintiff's proposed issue No 1, this issue is academic.

The plaintiff's proposed issue No 3

If the answer to the above is in the affirmative, whether the said PA and deed of substitution of power of attorney can replace the statutory requirement to have consideration in an agreement for it to be valid as stipulated by s 26 of the Contracts Act 1950?

[51] By reasons given aforesaid, the answer to this issue is in the affirmative.

The plaintiff's proposed issue No 4

Whether the defendant, as solicitors engaged to prepare an agreement and paid professional fees, owe a duty to the plaintiff to take care in preparing the said agreement and if so whether the defendant was in breach of that duty in the said preparation?

[52] On the issue whether the defendant, as solicitors, engaged to prepare an agreement and paid professional fees owe a duty to the plaintiff to take care in preparing the said CCS agreement, the answer is in the affirmative. However, I do not find that the defendant was in breach of that duty in the said preparation.

The plaintiff's proposed issue No 5

A Whether the said agreement ('CCS agreement') is void ab initio for want of consideration pursuant to s 26 of the Contract Act 1950?

[53] For all the reasons aforesaid, the answer is in the negative.

B *The plaintiff's proposed issue No 6*

Whether the plaintiff's claim herein is statute barred by the Limitation Ordinance (Cap 49)?

C **[54]** I shall deal with this issue together with the defendant's proposed issue No 9 as they are similar.

[55] For all the above reasons, I could have dismissed the plaintiff's claim. However, for completeness, I have also considered the issues raised by the
D defendant.

The defendant's issue No 1

Whether the defendant had exercised all due care, skill and diligence in the
E preparation of the CCS agreement, power of attorney and deed of substitution of power of attorney as agreed and conveyed by the plaintiff and Chin Chong?

[56] By virtue of my positive finding in respect of the plaintiff's issue No 4, the logical answer to this issue should be in the positive.
F

The defendant's issue Nos 2, 2.1 and 2.2

2. What were the intentions of the plaintiff and Chin Chong in January 2012?

2.1 Whether the terms of the agreement as agreed and conveyed by the
G plaintiff and Chin Chong are, inter alia, as follows:

(a) Chin Chong shall engage the plaintiff to carry out and complete the partially completed Chin Chong's units in accordance with the relevant approved plans (at the plaintiff's own costs);

H (b) the plaintiff shall pay Chin Chong the sum of RM900,000 in accordance with the stipulated time as contained in the CCS agreement;

(c) Chin Chong shall assign to the plaintiff absolutely all its beneficial
I interest in Chin Chong's units;

2.2 Whether the plaintiff and Chin Chong intended the CCS agreement, power of attorney and deed of substitution of power of attorney to be meant for the sale and/or assignment of Chin Chong's units to the plaintiff in consideration of the plaintiff agreeing to provide labour and

material to carry out, perform and complete the said partial works and a further payment of RM900,000 to Chin Chong?

[57] In light of the reasons of my judgment elucidated in paras 53–57 above, the answers to these issues are in the affirmative.

The defendant's issue No 2.3

2.3 Whether the plaintiff undertook to provide labour and material to carry out, perform and complete the said partial works in accordance with the relevant plans on a 'as is where is basis'?

[58] In alleging that the defendant had negligently prepared the CCS agreement, the plaintiff had enumerated under 'particulars' of para 15 of the statement of claim, the defendant's failure to set out the exact scope of the said partial works to be completed by the plaintiff in Schedule 1 of the CCS agreement.

[59] This allegation is clearly without basis. It is clearly stated in cl 1 of the CCS agreement that the plaintiff do 'undertake to provide labour to carry out, perform and complete the works specified in the Schedule 1 herein in accordance with the relevant approved plans on a 'as is where is basis'.

[60] Thus, the answer to this issue is in the affirmative.

The defendant's issue No 3

Whether the plaintiff exercised the power given under the deed of substitution of power of attorney by instructing the defendant to draft various sale and purchase agreements and supplementary deeds in respect of Chin Chong's units?

[61] The answer must be in the affirmative. There is unchallenged evidence from DW1 who testified that around mid 2012, the plaintiff in exercise of the power given under the deed of substitution of power of attorney expressly instructed the defendant to draft various sales and purchase agreements and supplementary deeds in respect of Chin Chong's units, namely, the sale and purchase agreement marked exhs 58–71, 73–86, 87–88, 91–104, 105–118, 123–134 and 137–151 all of exh C (see Q&A 12 of WSDW1).

The defendant's issue No 4

4. Whether the plaintiff breached the terms and condition of the CCS agreement as follows:

A 4.1 Failing to pay the remaining balance of RM625,000 to Chin Chong within the agreed stipulated time as contained in the CCS agreement; and/or

4.2 Failing to complete the said partial works within the stipulated time as contained in the CCS agreement.

B

[62] There is also unchallenged evidence from DW1 that the plaintiff breached the terms and condition of the CCS agreement as follows:

C (a) the plaintiff neglected, refused and/or failed to pay the remaining balance of RM625,000 to Chin Chong within the agreed and stipulated period as contained in the CCS agreement; and

(b) the plaintiff also failed, neglected and/or refused to complete the said partial works within the stipulated time as contained in the CCS agreement.

D (see Q&A 10 of WSDW1).

[63] The answer to this issue is, therefore, in the affirmative.

E *The defendant's issue No 5*

Whether the plaintiff, by conduct, is estopped and precluded from saying that the CCS agreement is, inter alia, void in law and or lack consideration?

F

[64] Unchallenged evidence has been led through DW1 which showed that upon execution of the CCS agreement, both the plaintiff and Chin Chong proceeded to carry out their respective obligations under the agreement, the plaintiff, upon delivery of vacant possession of Chin Chong's units, took the same on the 'as is where is basis' to complete the said partial works. The plaintiff commenced work on the said partial works and paid Chin Chong totaling RM275,000 pursuant to the CCS agreement.

G

[65] It is also DW1's unchallenged evidence that around mid 2012, the plaintiff in exercise of the power given under the deed of substitution of power of attorney expressly instructed the defendant to draft various sale and purchase agreements and supplementary deeds in respect of Chin Chong's units, namely: the six sale and purchase agreements marked exhs 58–71, 73–86, 87–88, 91–104, 105–118, 123–134, 137 and 151 all of Part C.

H

I

[66] By the plaintiff's conduct as described above, the plaintiff had permitted and induced the defendant to believe that the CCS agreement, the power of attorney and the deed of substitution of power of attorney are to the plaintiff's satisfaction. In the premise, I agree with learned counsel for the

defendant that the plaintiff is estopped and precluded from saying that the CCS agreement is void in law and lack consideration.

[67] Thus, my answer to this issue is in the affirmative.

The defendant's issue No 6

Whether the plaintiff's allegation that the CCS agreement is void in law for lack of consideration is an afterthought in order to avoid its obligations and /or in order to negate the plaintiff 's breaches of the terms and condition of the CCS agreement?

[68] Pursuant to cl 2(a) of the CCS agreement, the plaintiff agreed and covenanted to pay a sum of RM900,000 as the contract price for the said partial works.

[69] Pursuant to cl 2(b) of the CCS agreement, upon signing of the CCS agreement, the plaintiff shall pay to Chin Chong a sum of RM53,000.

[70] Pursuant to cl 2(c) of the CCS agreement, another sum of RM135,000 was to be paid to the relevant authority as deposit pending the issuance of the road certificate and shall be paid by the plaintiff to Chin Chong within one month from the date of issuance of road certificate, failing which an interest of 10% pa will be imposed together with the amount outstanding.

[71] Pursuant to cl 2(d) of the CCS agreement, the balance of RM660,000 shall be settled within six months from the date of the execution of the CCS agreement ie by 11 July 2012 and another sum of RM330,000 within 90 days from the first three months period ie by 11 April 2012, failing which an interest of 10%pa will be imposed and calculated together with the amount outstanding on the fourth month.

[72] It is an agreed fact that the plaintiff only made various payments to Chin Chong amounting to RM275,000.

[73] It is DW1's unchallenged testimony that on 17 January 2014, Chin Chong through their advocates, Gladys' Law Firm, issued a notice of termination of the CCS agreement to the plaintiff for, inter alia, the plaintiff's failure to make payment of the remaining sum due and owing to Chin Chong within the stipulated time as well as the plaintiff's failure, neglect and/or refusal to complete the works within the stipulated time stated in the CCS agreement (see Q&A 11 of WSDW1).

[74] DW1 testified (unchallenged) that it was only after the receipt of the notice of termination that the plaintiff is alleging for the first time, as an afterthought, that the CCS agreement is void in law for want of consideration in order to avoid its responsibility and liability under the CCS agreement (see Q&A 13 of WSDW1).

[75] Regards being had to the unchallenged evidence adduced through DW1, I am satisfied that the defendant has shown that the plaintiff, in raising this allegation that the CCS agreement is void for lack of consideration only after Chin Chong had served the notice of termination upon the plaintiff, is clearly an afterthought and it is devised in order to escape its responsibility and liability under the CCS agreement.

[76] Thus, my answer to this issue is in the affirmative.

The defendant's issue No 7

Whether the plaintiff had taken any or any reasonable steps to mitigate the loss or damage allegedly suffered by them?

[77] In light of my affirmative answers, I consider it unnecessary to consider this issues.

The defendant's issue No 8

Whether there is duplicity in the plaintiff 's claim of RM275,000 against Chin Chong given that the plaintiff, in Suit No KCH-A52NCvC-14/4 of 2016 (SC 2), is claiming the sum of RM275,000 against Chin Chong?

[78] In light of my affirmative answers, I consider it unnecessary to consider this issues.

The defendant's issue No 9

Whether the plaintiff's claim is statute barred as it was not brought within the time frame stipulated by Item 19 (two years) and/or Item 93 (three years) of Part II and Part III of the Schedule of the Limitation Ordinance (Sarawak Cap 49)?

[79] The respective Items of the Limitation Ordinance (Sarawak Cap 49) is hereby reproduced below:

Item	Description of Suit	Period of Limitation	Time from which period begins to run
Item 19 Part II	For compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for	2 years	When the malfeasance, misfeasance or nonfeasance takes place

Item 93 Part III	For compensation for the breach of any contract, express or implied, not in writing and not herein specially provided for	3 years	When the contract is broken, or, where there are successive breached, when the breach in respect of which the suit is instituted occurs, or, where the breach is continuing, when it ceases.
Item 97	Suit for which no period of limited is provided elsewhere in this schedule	6 years	When the right to sue accrues.

[80] In *Vun Chun Fah & Anor v Telekom Malaysia Bhd* [1997] MLJU 239, Ian Chin J (as he then was) referred to *Avaran Kutti (Minor) v Cheriyakkan And Ors* AIR 1953 Mad 480, where the court there at p 480 said:

> The words 'malfeasance, misfeasance or non-feasance' are well known species of tort. In *Rustomjil's Laws of Limitation* at p 657 they are described as follows:
>
> > These torts are often considered as of three kinds, viz: non-feasance, or the omission of some act which a man is by law bound to do, misfeasance being the improper performance of some lawful act, or malfeasance, being the commission of some act which is in itself unlawful.

[81] Given that the action against the defendant herein lie in the tort of professional negligence, I am of the view that the applicable item ought to be Item 19 of the Schedule of the Sarawak Limitation Ordinance. As such the answer is in the affirmative.

CONCLUSION

[82] For all the reasons above, I dismiss the plaintiff's claim with costs of RMRM25,000 comprising of the following, subject to the allocator fee:

(a) RM20,000 as getting up fees;

(b) RM1,288 (round off RM1,300) as disbursement;

(c) RM3,120 as the unpaid costs which the court awarded against the plaintiff in the plaintiff's notice of application to strike out the defence; and

(d) RM500 being costs thrown away against the plaintiff's counsel.

Plaintiff's claim dismissed with costs of RM25,000

Reported by Fatin Mohd Ismail